UNITED STATES OF AMERICA	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
	)	
	)	SUPPLEMENTAL BRIEF ON
	)	BEHALF OF APPELLANT
	)	
	)	Case No. 07-001
vs.	)	
	)	Tried at Guantanamo Bay, Cuba
	)	On 4 June 2007
	)	
	)	Before a Military Commission
OMAR AHMED KHADR	)	Convened by MCCO # 07-02
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	Presiding Military Judge
a/k/a "Ahmed Muhammed Khali"	)	Colonel Peter E. Brownback III

TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

SUPPLEMENTAL BRIEF IN SUPPORT OF THE GOVERNMENT'S APPEAL

The Government respectfully submits this supplemental brief in support of its appeal. In its initial brief, the Government set forth the procedural and factual history of this case, as well as the assignments of error in the decisions below. At the heart of this case, however, are questions about the functioning of the comprehensive system for trying unlawful enemy combatants established by Congress. Congress created this system not only to resolve specific issues in our Nation's armed conflict with al Qaeda and the Taliban, but also in the next armed conflict. This supplemental brief sets forth the genesis of and purposes underlying the Military Commissions Act of 2006. When the Act is properly understood, it is clear that the trial court's ruling may not stand.

I

The trial court's ruling dismissing the prosecution of Omar Ahmed Khadr upends the careful structure established by Congress. The trial court's two opinions are not

based on unique features of Khadr's case; if the military commission lacks jurisdiction over Khadr, then the military commission currently lacks jurisdiction over every accused currently detained at Guantanamo Bay. *See* Opinion on Jurisdiction (June 4, 2007) ("June 4 Op."); Disposition of Prosecution's Motion for Reconsideration (June 29, 2007) ("June 29 Op."). The trial court held that it is powerless directly to determine "unlawful enemy combatant" status, and therefore its own jurisdiction. According to the trial court, Congress exclusively relied on the prior determinations of Combatant Status Review Tribunals ("CSRTs") for that purpose, a process we explain in more detail below. But simultaneously the trial court held that rules for CSRTs, in place at the time of the MCA, were such that no CSRT had or could have made the determination relevant to jurisdiction. As explained below, the Court's ruling confuses generalized terms in the Act designed for future conflicts with decisions that Congress made for the current conflict with al Qaeda and converts what Congress intended to be an expedient for military commission proceedings into a paralyzing obstacle.

A. The Military Commissions Act Established a Comprehensive System for Trying Unlawful Enemy Combatants

On September 11, 2001, nineteen men armed with box cutters captured four commercial airliners and used them as weapons in devastating attacks aimed at the World Trade Center in New York, the Pentagon, and the heart of our Nation's capital. Those attacks resulted in the deaths of nearly 3,000 Americans. It soon became clear that al Qaeda had planned and carried out those attacks, thus bringing to the United States what had been an armed conflict fought abroad. Congress confirmed the existence of this conflict and authorized the use of military force against the organizations responsible for

the attacks, and the conflict against al Qaeda, its Taliban allies, and associated forces continues to this day.

The present conflict is a war unlike any other the United States has fought. Al Qaeda and its supporters are not the uniformed armies of a state or an organization that systematically complies with the laws of war. To the contrary, al Qaeda is an international terrorist organization that conducts its military activities through stealth and deception and whose primary targets were and remain innocent civilians.

Given al Qaeda's objectives, the Nation was further faced with the need for a mechanism to bring to justice those responsible for the significant war crimes that had been, and undoubtedly would continue to be, committed, all in the context of a continuing armed conflict against al Qaeda and its supporters. Accordingly, on November 13, 2001, the President established military commissions for trying alleged terrorists who had come into the custody of the United States in connection with the armed conflict against al Qaeda. *See* 66 Fed. Reg. 57833 (Nov. 16, 2001). The jurisdictional provisions of the President's 2001 order made it applicable to members of al Qaeda and certain others. *See id.* § 2(a). The President's order was tailored to the exigencies before him and thus sought to establish military commission procedures only for the current conflict with al Qaeda and the Taliban. *See, e.g., id.* § 1(g) (emphasizing that issuance of the order was "necessary to meet the emergency" caused by the attacks of September 11th). The Department of Defense issued rules implementing the President's order, and in February 2004 brought its first changes thereunder.

In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court held that the military commissions established by the President were not legally authorized because a

then-effective provision of the Uniform Code of Military Justice ("UCMJ") required such tribunals to track court-martial procedures and to comply with the laws of war. *Id.* at 2790-93. The Court's ruling focused on the procedures of those commissions to determine the guilt or innocence of individual defendants. *See id.* at 2786-98. The Court did not suggest, however, nor did the parties argue, that the class of individuals subject to military commission proceedings—directed as it was to persons connected with a global terrorist organization at war with the United States—was too broad.

The Supreme Court's decision in *Hamdan* left Congress with an important task—to develop a system that would permit the trial of terrorist combatants in the current conflict with al Qaeda. While addressing that acute need, Congress (at the urging of the Department of Defense) also sought to establish an enduring system that would provide for the trial of unlawful enemy combatants in this *and in future conflicts*. Congress did not seek to establish military commissions as an *ad hoc* solution, or to have to revisit these difficult questions in the next armed conflict. As Senator Sessions explained: "We are legislating through this law for future generations, creating a system that will operate not only throughout this war, but for future wars in which our Nation fights." 152 Cong. Rec. S10354-02, S10404 (Sept. 28, 2006).

The MCA's jurisdictional provisions lay at the heart of Congress's structure of military commissions that could serve beyond the current conflict. To that end, Congress defined those who could be tried by military commission in general terms. Congress granted military commission jurisdiction over "unlawful enemy combatants," and it made clear that "lawful enemy combatants" could not be so tried. Part of the definition of "unlawful enemy combatant" was phrased in terms that could apply to any conflict: "any

person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant." 10 U.S.C. § 948a(1)(A)(i). Similarly, Congress defined "lawful enemy combatant" to refer generically to the characteristics of groups and organizations in armed conflicts, tracking the criteria for determining whether a person is part of a group that would entitle him to prisoner of war status under Article 4 of the Third Geneva Convention. *See id.* § 948a(2).

But Congress also understood that many questions regarding "unlawful enemy combatant" status already had been resolved in the current conflict against al Qaeda and the Taliban, and Congress did not wish that those determinations be revisited. Accordingly, Congress expressly mandated, in a parenthetical at the end of the section, that the generalized definition of "unlawful enemy combatant" that it had provided for all conflicts would "include[ ] a person who is part of the Taliban, al Qaeda, or associated forces." *Id.* § 948a(1)(A)(i). This crucial parenthetical establishes, as a matter of statute, that a member of al Qaeda or the Taliban—without more—is an "unlawful enemy combatant" who can be tried by military commission. In so doing, Congress statutorily ratified the President's prior determination that al Qaeda and the Taliban are not groups that bear characteristics that would entitle their members to prisoner-of-war status or, by extension, the status of lawful enemy combatants as defined under the MCA. *See* Memorandum Re: Humane Treatment of Taliban and al Qaeda Detainees, The White House (Feb. 7, 2002); 10 U.S.C. § 948a(2). The statute wholly resolves the question whether combatancy is lawful as to the parties in the armed conflict with al Qaeda and the Taliban—the conflict in which Khadr's prosecution arises.

Beyond recognizing that questions of lawfulness had been resolved in this conflict, Congress also understood that issues regarding the association of individual detainees with our enemies had been determined through case-by-case inquiries undertaken by the Department of Defense. Specifically, the United States had conducted, or was in the process of conducting, Combatant Status Review Tribunals ("CSRTs") for all persons detained at Guantanamo Bay, Cuba, in connection with the armed conflict with al Qaeda and the Taliban. CSRTs addressed only the question of detention of those who were members or associates of al Qaeda and the Taliban, because there is no doubt that both are "unlawful" organizations.

Since 2005, CSRTs have been the subject of extensive legislative attention. In the Detainee Treatment Act of 2005 ("DTA"), enacted nine months before the MCA, Congress wholeheartedly embraced the CSRT system. Congress used final CSRT determinations as the exclusive route to judicial review of the legality of detention. *See* DTA § 1005(e)(2)(A). Congress required certain specific provisions in new rules for CSRTs and directed the Department of Defense to report those rules to Congress within 180 days of the DTA's enactment. *See id.* § 1005(a)(1). The Department of Defense promulgated amended CSRT procedures, with an effective date of July 14, 2006, and reported those procedures to Congress. By the time the MCA was enacted, all but 14 persons detained at Guantanamo Bay had received CSRT determinations making the ultimate findings called for in the rules reported to Congress.

In the MCA, Congress built on the foundation of the CSRT process for a second time. Congress provided an alternative basis for establishing military commission jurisdiction, providing jurisdiction over "a person who, before, on, or after the date of the

enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the Secretary of Defense." 10 U.S.C. § 948a(1)(A)(ii). This separate jurisdictional provision again allowed settled questions in the current conflict to stand, while establishing an enduring system for future conflicts that may occur. Congress saw no need to require duplicative determinations of a connection with al Qaeda and the Taliban: For the bulk of those who would be tried, those determinations already had been made in CSRT proceedings. Accordingly, Congress made clear that CSRT determinations that occurred before the date of the MCA's enactment would suffice to establish military commission jurisdiction. Military commissions were to move forward with dispatch in the current conflict.

At the same time, Congress did not intend to require that the Department of Defense rely on CSRTs, with the right of appeal to the civilian courts, in all future conflicts. *See infra* at pp.12-13. Depending on the nature of the conflict, and the composition of the enemy, the Department might employ tribunals similar to CSRTs—"other competent tribunals." Or the Department of Defense may decide not to conduct such tribunals at all. But such a decision would not disable the United States from prosecuting "unlawful enemy combatants" by military commission. Establishing "unlawful enemy combatant" status—the basis for military commission jurisdiction—through a prior CSRT determination (or determination by another competent tribunal) was but *one of two* disjunctive options in the statute; it is a sufficient basis for establishing jurisdiction, but *not a necessary one*. *See* Part I.A.1, *infra*. The statute, and

its reference to CSRTs, thus provided the Department of Defense with a safe harbor for work it had already done.

B. The Military Commission Prosecution of Omar Ahmed Khadr

Khadr's military commission prosecution is a microcosm of the course of military commission proceedings explained above. Khadr was detained by U.S. forces in Afghanistan in July 2002. As detailed in the charges filed before the military commission, Khadr is alleged to have planted and detonated roadside explosives, as well as to have fired weapons and thrown grenades, in support of al Qaeda during a battle against U.S. forces. His actions resulted in the death of Army Sergeant First Class Christopher Speer.

As explained in the Government's initial brief, this is but one part of the substantial evidence of Khadr's membership in and support of al Qaeda. This evidence was also before the CSRT considering Khadr's status. Khadr's CSRT proceedings occurred in 2004, and the CSRT determined that Khadr was an "enemy combatant" under the CSRT rules in place at the time because of his connection with al Qaeda. With regard to the ultimate finding of the CSRT, these were the same rules reported to Congress in 2006. And this same CSRT standard was operative when Congress passed the MCA on October 17, 2006.

The CSRT made several specific findings regarding Khadr's activities. Upon determining Khadr's membership in and extensive support of al Qaeda, Khadr's CSRT—like the hundreds before and after it considering a detainee's connection with al Qaeda—did not make detailed findings on whether al Qaeda constituted the "regular forces of a State party," or on whether it was a "militia, volunteer corps, or organized resistance

movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war." 10 U.S.C. § 948a(2). After all, these determinations are about al Qaeda, and, properly made, the characteristics of al Qaeda as an organization would not change from case to case.

Charges of Murder in Violation of the Law of War, Attempted Murder in Violation of the Law of War, Conspiracy, Providing Material Support for Terrorism, and Spying were sworn against Khadr on 5 April 2007. The charges were referred for trial by military commission on 24 April 2007.

The trial court scheduled an arraignment for 4 June 2007 at 1000, and a pretrial hearing for the night before. At that pretrial hearing, the trial court announced that it wished to discuss its jurisdiction the next day. Khadr had not filed a motion to dismiss. The Court did not request any briefing on the issue. The court held twenty minutes of argument on the issue of its jurisdiction. Twenty-two minutes later, the court returned with a ruling that not only dismissed the charges against Khadr but also upended the entire system for military commission prosecutions established by Congress.

Specifically, the court determined that Khadr's CSRT determination was insufficient to establish military commission jurisdiction because CSRT rules governing that proceeding called only for a determination that Khadr was an "enemy combatant," not an "unlawful enemy combatant." Ironically, the provision that Congress had relied upon to accelerate military commission proceedings was invoked to delay them substantially and to result in the suspension of all military commission prosecutions. The trial court held that only a CSRT (or other form of administrative tribunal) completed

before the beginning of a military commission, could determine an accused's status as an "unlawful enemy combatant." The military commission could not determine the accused's status directly, the trial court held. These two holdings are contrary to the MCA, as we explain below.

II

A. The Court Erred in Determining That It Lacked Authority to Determine Directly That the Accused Is an "Unlawful Enemy Combatant"

The trial court ruled that it lacked legal authority to determine directly Khadr's "unlawful enemy combatant" status. That ruling cannot be squared with the text, structure, and purpose of the MCA, nor can it be squared with the long tradition of general courts-martial incorporated by the Act and ratified by the Secretary of Defense.

1. The Military Commission's Authority to Determine Jurisdiction Directly Is Required by the Bifurcated Structure of Section 948a(1)(A)

The trial court's most fundamental error was to consider only one half of the key provision establishing military commission jurisdiction. Section 948a(1)(A) clearly establishes two separate methods for determining military commission jurisdiction. It defines "unlawful enemy combatant" as:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); ***or***
>
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

10 U.S.C. § 948a(1)(A) (emphasis added). Subsections (i) and (ii) are separate; they are disjoined by the word "or"; and they set forth alternative courses for establishing jurisdiction. *See, e.g., In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996) ("'Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings,' and a statute written in the disjunctive is generally construed as 'setting out separate and distinct alternatives.'") (quoting *Reiter v. Sonotone Corporation*, 442 U.S. 330, 339 (1979)).

According to the trial court, the Government must establish "unlawful enemy combatant" status—and the military commission's jurisdiction—through a CSRT or "another competent tribunal" under subsection (ii). *See* June 4 Op. at 1; June 29 Op. at 4. Subsection (i) effectively disappears as an alternative basis for jurisdiction. Subsection (i) is converted, contrary to the text, into nothing more than a definition that aids the CSRT determination to take place under subsection (ii). In other words, the trial court has rewritten the provision into the conjunctive—as though they were joined by "and"—rather than giving force to the actual language of the statute. The military judge never provided an account for how such a holding could be squared with the disjunctive structure of section 948a(1)(A).

Instead, the trial judge focused exclusively on section 948d(c) of the MCA, which tracks the second half of section 948a(1)(A) and states:

> A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal . . . that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.

10 U.S.C. § 948d(c). According to the trial judge, that section mandates that "there shall be an administrative decision by the CSRT which will establish the status of a person for

purposes of the MCA" before the military commission can be convened. June 4 Op. at 1. Otherwise, the court explained, "there is no reason for the use of the word 'dispositive' in section 948d(c)." June 29 Op. at 7. To the contrary, section 948d(c) reinforces that a CSRT's determination of "unlawful enemy combatant" status serves as a safe harbor for military commission jurisdiction, complementing subsection (ii) of section 948a(1)(A). In this context, it was crucial to carve an exception from the military commission's authority to determine its own jurisdiction. *See* Part I.A.2, *infra*. Section 948d(b) makes clear that military commissions shall have no jurisdiction over lawful enemy combatants. In order to remove any ambiguity that this provision does not allow an accused who has received a CSRT to argue that he is nonetheless a "lawful enemy combatant," section 948d(c) makes clear that the CSRT determination that a person is an "unlawful enemy combatant" is "dispositive for purposes of jurisdiction for trial by military commission." But that determination is dispositive only when it exists: When there is not such a determination, subsection (i) of section 948a(1)(A) makes clear that there is an *alternative*—the military commission may receive evidence on and determine satisfaction of the elements contained in subsection (i).[1]

That subsection (ii) serves as an alternative and sufficient path—not as an exclusive means—for determining jurisdiction vindicates the underlying purpose of the

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[1] The trial court repeatedly insists that the term "dispositive" requires status to have been determined sometime before military commission proceedings. June 4 Op. at 1; June 29 Op. at 5. When section 948d(c) is properly understood within the structure of the MCA as a safe harbor, however, it becomes clear that a CSRT determination controls and must become "dispositive" only in the event a relevant determination is presented.

The text of section 949d(c), standing alone, makes this proposition clear. The section provides that "*a* finding . . . that a person is an unlawful enemy combatant is dispositive for purposes of" military commission jurisdiction. (emphasis added). The provision is only triggered when there is such a finding, establishing a safe harbor for the government. Nothing in the text of section 949d(c) assumes that there must be such a finding. And indeed, the Secretary of Defense endorsed this interpretation in the Manual for Military Commissions. *See* Part II.A.2., *infra*.

MCA. Congress sought to establish an enduring process for prosecuting unlawful enemy combatants for war crimes in this and future conflicts. With an eye toward future conflicts, Congress understood that the United States would not always conduct CSRTs or other competent tribunals in future conflicts prior to trial by military commissions. *See* 152 Cong. Rec. S10354-01, S10403 (Sept. 28, 2006) (statement of Sen. Cornyn) (discussing the premise of the MCA that "we do not want to force the military to hold CSRT hearings forever, or in all future wars"); *id.* at S10270-71 (Sept. 27, 2006) (statement of Sen. Kyl) ("Because the military, in response to criticism of Guantanamo, started giving everyone at Guantanamo a CSRT hearing, these critics contend, it should be compelled to do so for all future detainees, and for all future wars. What is now given as a matter of executive grace, they contend, should be transformed into a legislative mandate. This the Armed Services committees and this Congress declined to do."); *see also* Rule for Military Commissions ("RMC") 202(b), *discussion note* ¶ 4 ("The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding.").

At the same time, Congress desired to restart military commission prosecutions quickly and recognized that relevant and individualized determinations of the detainees' connection with al Qaeda and the Taliban already had been made in the current conflict through CSRTs. Congress deemed those proceedings adequate to establish unlawful enemy combatant status and concluded that, in cases where relevant determinations had been made, such proceedings need not be duplicated to establish military commission jurisdiction. The Act carries these understandings into force. It makes CSRTs one option—and a dispositive one—where a relevant determination has occurred (as would

often be the case in the current conflict) and thereby avoids the time-consuming revisiting of determinations that have already been made. But the Act does not impose upon the Department of Defense an obligation to conduct such hearings in all future conflicts and, in cases where a CSRT had not made a relevant determination, it does not disable the military commission from determining the question in the first instance. The trial court's ruling turns these principles on their head and cannot account for section 948a(1)(A) of the Act. As such, the decision below simply cannot be squared with the text, purpose, and history of the MCA.

The trial court's misunderstanding of the two *alternative* mechanisms for establishing military commission jurisdiction set its opinion on a course to resolve questions that did not control its jurisdiction. The court exclusively focused on whether the CSRT had in fact determined that Khadr was an *unlawful* enemy combatant or whether the military commission was a "competent tribunal" that would satisfy the second half of section 948a(1)(A). As we explain below, the CSRT's determination was sufficient (*see* Part II.B, *infra*) and, though not legally relevant here, the military commission would qualify as a "competent tribunal" (*see* Part II.A.3, *infra*). No matter the outcome of these inquiries, however, the court's determination that it could not determine directly Khadr's status as an "unlawful enemy combatant," and thus the military commission's jurisdiction over him, was error.

2. The Rules for Military Commissions, Drawn from Longstanding Court-Martial Practice, Confirm the Military Judge's Authority Directly to Find Facts Establishing Military Commission Jurisdiction

That the military commission may find directly the facts necessary to determine "unlawful enemy combatant" status and military commission jurisdiction is confirmed by

the Rules for Military Commission and longstanding general courts-martial practice. The trial court attempted, at a high level of generality, to distinguish this long history. While the court recognized that general courts-martial routinely make such jurisdictional determinations, *see* June 29 Op. at 8, it nonetheless held that military commissions are "different," *id.* at 6. The trial court acknowledged "that there is no clear statutory directive" establishing this fundamental departure. *See id.* As explained below, the trial court's reasoning falls well short of the showing needed to displace such longstanding court-martial procedures.

As an initial matter, regardless of whether military judges "understandably do not favor" finding jurisdictional facts, June 29 Op. at 5, that is precisely what the plain terms of the MCA require. Section 948a(1)(A)'s two subsections establish two different categories of jurisdictional facts to be found. The first is the elements of subsection (i) regarding the circumstances of the accused, such as whether the accused was actually "a part of the Taliban, al Qaeda, or associated forces." The second is the *fact* of a determination by a CSRT or another competent tribunal. *See* 10 U.S.C. § 948a(1)(A)(ii). Either factual showing will suffice. In either event, section 948a(1)(A) establishes a fact-finding role for the military judge in jurisdictional matters from the beginning.

Far from abnormal, a military judge finding facts that establish military commission jurisdiction is expressly contemplated by the Rules for Military Commissions. Rule 905 provides that the Prosecution will bear "the burden of persuasion" on "a motion to dismiss for lack of jurisdiction" and that "the burden of proof on any factual issue the resolution of which is necessary to decide [such] a motion

shall be by a preponderance of the evidence."[2] RMC 905(c)(1), (c)(2)(B). Not a new creation for military commissions, Rule 905 has a long history in general courts-martial and, as such, holds a privileged position under the MCA. *See* 10 U.S.C. § 949a(a) (directing the Secretary of Defense to adopt procedures for military commissions that, "so far as the Secretary considers practicable or consistent with military or intelligence activities, *apply the principles of law and the rules of evidence in trial by general courts martial*") (emphasis added).

Under the relevant rules for courts-martial, made applicable in military commissions by RMC 905, military judges for decades have been doing precisely what the Government had requested here—finding jurisdictional facts, in response to a motion to dismiss, by a preponderance of the evidence. As a general matter, personal jurisdiction over a criminal defendant is a question of law that military judges decide and support with findings of fact. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000) ("When an accused contests personal jurisdiction on appeal, we review that question of law de novo, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record."); *see also United States v. Engle*, 2006 CCA LEXIS 115, at *7-8 (A.F. Ct. Crim. App. 2006) (quoting *Melanson*). Federal district judges in Article III courts similarly make the findings of fact necessary to determine whether the court has personal jurisdiction over a defendant and may therefore hear the case. *See United States v. Anderson*, 472 F.3d 662, 666-67 (9th Cir. 2006) (analyzing whether an extradition treaty applies to the facts of the case and whether it has been violated, and concluding that it did not bar the trial court from exercising personal jurisdiction); *United*

[2] Thus, the court below was plainly wrong in its suggestion that the Government bears the burden of proving jurisdiction beyond a reasonable doubt. *See* June 29 Op. at 4.

States v. Darby, 744 F.2d 1508, 1530 (11th Cir. 1984) (discussing the circumstances of the procurement of defendant's presence and whether they defeat personal jurisdiction). In the court-martial system, jurisdiction is established through allegations by the Government, and military judges consider challenges to those allegations through motions to dismiss for lack of jurisdiction; they conduct hearings on such motions, take evidence, and make findings of fact and conclusions of law. *See, e.g.*, *United States v. Ernest*, 32 M.J. 135, 136-37 (C.M.A. 1991) (listing twenty-four findings of fact made by the trial court in determining whether to grant defendant's motion to dismiss for lack of personal jurisdiction); *United States v. Cline*, 26 M.J. 1005, 1007 (A.F.C.M.R. 1988) (finding that an analysis of the facts is required to resolve the personal jurisdiction issue), *aff'd United States v. Cline*, 29 M.J. 83 (C.M.A. 1989). In *United States v. Cline*, 1987 C.M.R. LEXIS 819 (A.F.C.M.R. 1987), for example, the appellate court made this principle clear, by returning a case to the trial court because the personal jurisdiction issue was "not adequately developed in the record." *Id.* at *1. The court set out a list of questions for the *trial judge* to answer and directed him to make "specific findings of fact as to jurisdiction over the accused." *Id.*

In this way, the Manual for Military Commissions confirms that a military judge has legal authority to conduct an evidentiary hearing and to determine whether the accused is an unlawful enemy combatant, as defined by section 948a(1)(A)(i), over whom the court has jurisdiction. In addition to Rule 905, Rule 202(b) makes clear that the military judge may directly determine the accused's unlawful enemy combatant status, and that the proper vehicle for such a determination is through the resolution of a motion to dismiss. The Manual states that "the M.C.A. does not require that an

individual receive a status determination by a C.S.R.T. or another competent tribunal before the beginning of a military commission proceeding." RMC 202(b) *discussion note* ¶ 4; *see supra* section I.A. And the Manual specifies that "if, however, the accused has not received such a determination, *he may challenge the personal jurisdiction of the commission through a motion to dismiss*." RMC 202(b) *discussion note* ¶ 4 (emphasis added). This conclusion follows directly from the text, structure, and purpose of the Military Commissions Act.[3]

The trial court quietly conceded that these longstanding principles memorialized in the Manual for Military Commissions would obligate him to find jurisdictional facts in a general court-martial, *see* June 29 Op. at 8, but he raised an objection as a matter of policy: The trial court suggested it is somehow more difficult for military commissions to determine their own jurisdiction than for courts-martial to make the same determination. *See* June 29 Op. at 5, 8. Of course, the Secretary of Defense has resolved those policy objections against the position of the trial court.[4] In any event, the objection is not accurate. One of the categories of "covered persons" under the UCMJ includes "[p]risoners of war in custody of the armed forces." UCMJ art. 2(a)(9), 10 U.S.C. § 802(a)(9). During time of war, therefore, courts-martial will face questions of similar difficulty. In any court-martial where jurisdiction turns on the accused's prisoner of war status, the military judge will be forced to make *precisely* the same sorts of pretrial

[3] Were there any doubt as to that conclusion, however, that doubt should be resolved in favor of the interpretation of the statute promulgated by the Secretary of Defense in the Manual for Military Commissions. As explained below, the Secretary's interpretation is entitled to deference and may be overturned only if it is plainly contrary to the statute or unreasonable. *See* Part II.B.3, *infra*.

[4] Congress vested the Secretary of Defense—*not* the military judge—with discretion to make policy-based exceptions to the rules for courts-martial, which enjoy a privileged position in military-commission proceedings. *See* 10 U.S.C. § 949a(a) (incorporating the rules for courts-martial into the procedures for military commissions, "so far as the *Secretary* considers practicable or consistent with military or intelligence activities") (emphasis added).

factual determinations that are required here—namely, whether the accused is a lawful or unlawful combatant.[5]

3. The Military Commission Is A "Competent Tribunal" Under Section 948a(1)(A)(ii)

Because of the authority provided for the military commission to decide its jurisdiction directly under section 948a(1)(A)(i) of the Act and the Rules for Military Commissions, whether the military commission is a "competent tribunal" under section 948a(1)(A)(ii) is not legally relevant. The court nonetheless dedicates much of its opinion to this question and determined that the military commission does not qualify as a competent tribunal. June 29 Op. at 4-5. Should this Court find that the resolution of that question relevant (contrary to the text, structure, and purpose of the Act), the military judge's ruling that the military commission is not a competent tribunal is also erroneous.

The term "competent tribunal" is drawn from Article 5 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, which requires that, "should any doubt arise" as to whether a detainee is entitled to the protections of prisoners of war, he shall enjoy such protections "until such time as [his] status has been determined by a *competent tribunal*." 6 U.S.T. 3316, 3323-24 (Aug. 12, 1949) (emphasis added). Accordingly, the court below correctly recognized that an Article 5 tribunal would be a "competent tribunal" within the meaning of the statute. June 29 Op. at 5. The drafters of Article 5 viewed a tribunal established to determine criminal sanctions for enemy combatants as the most perfect form of "competent tribunal." Indeed, the Conventions' drafters considered requiring that status be determined under Article 5 by the same

[5] Nor is it clear how the military judge could be "prejudiced" by his consideration of jurisdictional facts. June 29 Op. at 5. After all, the panel members—*not* the military judge—will be the ultimate arbiters of the accused's guilt or innocence; the fact that the latter is aware of facts proving the accused's terrorist activities hardly "prejudices" the former's role as neutral decisionmakers.

"military tribunal" qualified to mete out criminal punishment for war crimes. *See* International Committee of the Red Cross, III *Commentaries on the Geneva Conventions* at 77 (J. Pictet, gen. ed. 1960). Negotiators ultimately decided to adopt the more flexible term "competent tribunal," but harbored no doubt that a military commission convened for imposing criminal sanctions would meet that standard. *See id.*

The understanding of the Conventions' drafters also shows the error beneath the trial court's assertion that the accused "has a right to be tried only by a court which he knows has jurisdiction over him," requiring an administrative determination of status before military commission proceedings begin. June 4 Op. at 2. The most appropriate tribunal envisioned by the Conventions' drafters—a "military tribunal" established to resolve criminal charges—certainly would not have been separate from criminal proceedings. And no other court in the Nation has such a procedure of a separate tribunal determining jurisdiction before criminal proceedings begin. The trial court cited no authority for this right, nor does the law of war support it. If, contrary to the clear structure of the statute, the military commission were limited to one half of the MCA's jurisdictional provision—section 948a(1)(A)(ii)—the military commission would clearly constitute a "competent tribunal."[6]

[6] Consideration of the policy underlying Article 5 makes this proposition even clearer. The phrase "competent tribunal" was designed to take important status decisions out of the hands of an officer in the field of battle, "often of subordinate rank," and to invest those determinations in a tribunal with specified procedures and controlled by an officer of higher rank. *See* ICRC, III *Commentaries*, at 77. A military judge presiding over a military commission certainly satisfies that standard. Under the statute, the presiding military judge must be a commissioned officer of the armed forces, a lawyer admitted to the bar of a Federal court or highest court of a state, and certified "as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member." *See* 10 U.S.C. § 948j(b). The Rules for Military Commissions further require that the judge have at least two years' experience as a judge for general courts-martial, *see* RMC 503(b)(1), and the military judge is statutorily protected from adverse personnel action due to his performance as a military judge, *see* 10 U.S.C. § 948j(f).

* * *

The trial court's ruling has converted a provision designed to permit settled questions in the current conflict to remain so and prosecutions to move more quickly into a *de facto* suspension of military commission proceedings until entirely new administrative proceedings are designed and conducted. The military commission clearly may determine directly its jurisdiction, and the trial court's ruling to the contrary should be reversed.

B. The MCA Deems CSRT Determinations Made Before the MCA's Enactment Sufficient to Establish Jurisdiction

The trial court also determined that the final decision of Khadr's Combatant Status Review Tribunal was insufficient to establish military commission jurisdiction. The trial court's determination is contrary to the text, structure and purpose of the MCA. Even if the statute were ambiguous on this question, the Secretary of Defense has authoritatively interpreted the statute in the Rules for Military Commissions and concluded that CSRTs conducted under rules in effect at the time of the MCA's enactment do establish jurisdiction under section 948a(1)(A)(i) of the Act. The trial court did not address the RMCs on this issue, let alone afford the deference required for the interpretation of a statute by the agency explicitly charged by Congress with its implementation. A CSRT's determination of "enemy combatant" status, pursuant to rules in effect at the time of the MCA's enactment, conclusively establishes military commission jurisdiction.

1. The Trial Court's Opinion Is Contrary to the MCA's Determination That Al Qaeda Is an Unlawful Military Organization

The basis for the trial court's conclusion that Khadr's CSRT determination does not establish jurisdiction is straightforward: CSRT rules, in place at the time of Khadr's CSRT and at the time of the MCA's enactment, required a determination of whether the detainee was an "enemy combatant," rather than an "unlawful enemy combatant." June 29 Op. at 4. Because Section 948a(1)(A)(ii) requires a CSRT determination that the accused is an "unlawful enemy combatant," Khadr's CSRT did not suffice, nor will the CSRT of any detainee at Guantanamo Bay conducted under rules currently in place, should the trial court's ruling stand.

The trial court did not address the definition of "unlawful enemy combatant" in section 948a(1)(A)(i) of the MCA, which states:

> The term 'unlawful enemy combatant' means a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant *(including a person who is part of the Taliban, al Qaeda, or associated forces)*.

10 U.S.C. § 948a(1)(A)(i) (emphasis added). This definition begins with general language regarding criteria sufficient to establish "unlawful enemy combatant" status in any armed conflict against the United States. To qualify, a person would need to engage in hostilities or to provide certain support to the enemy, as well as fail certain generalized criteria for lawful combatancy (which is defined in section 948a(2) of the Act and discussed below). But Congress ended the definition by statutorily providing sufficient conditions for unlawful enemy combatant status in the current conflict with al Qaeda and the Taliban. Thus, the definition ends with a parenthetical phrase (hereinafter, "the statutory parenthetical") that defines an "unlawful enemy combatant" to "includ[e] a

person who is part of the Taliban, al Qaeda, or associated forces." The impact of this phrase is unambiguous: A person "who is part of the Taliban, al Qaeda, or associated forces"—without more—is an "unlawful enemy combatant" who may be tried by military commission. 10 U.S.C. § 948a(1)(A).

As explained above, the structure of this definition carries out Congress's intent to provide an enduring system for trials of "unlawful enemy combatants" by military commissions—one that could be applied in this conflict and the next. While the rest of section 948a(1) may apply to future enemies, the statutory parenthetical (and the congressional determination of unlawfulness embodied in it) unambiguously brings members of al Qaeda—like Khadr—under military commission jurisdiction.

The statutory parenthetical has two important consequences. First, it embraces and incorporates, as a matter of statute, organization-by-organization determinations of unlawfulness. The court below held that the President's determination of unlawfulness was inapposite because it was not "an individualized determination concerning Mr. Khadr." June 29 Op. at 9. The President's determination, however, is precisely the judgment—at the same level of organizational generality—that Congress made in the MCA.[7] Accordingly, this Court need not dwell on the details of the President's prior

[7] The legislative history demonstrates that Members of Congress were aware that they were making such a categorical determination. *See, e.g.*, 152 Cong. Rec. S10405 (Sept. 28, 2006) (Sen. Sessions) (quoting testimony of former Attorney General William P. Barr, which the Senator commended as "inform[ing] our understanding of the history, law, and practical reality of the DTA and the MCA," as follows: "'The threshold determination in deciding whether the [Geneva] Convention applies is a 'group' decision, not an individualized decision. The question is whether the military formation to which the detainee belonged was covered by the Convention. This requires that the military force be that of a signatory power and that it also comply with the basic requirements of Article 4 of the Treaty, *e.g.*, the militia must wear distinguishing uniforms, retain a military command structure, and so forth. Here, the President determined that neither al-Qaeda nor Taliban forces qualified under the Treaty.'"); 152 Cong. Rec. H7544 (Sept. 27, 2006) (Rep. Sensenbrenner) ("The bill creates a fair and orderly process to detain and *prosecute al Qaeda members* and other dangerous terrorists captured during the war on terror." (emphasis added)).

determination that all members of al Qaeda are unlawful enemy combatants because Congress has so determined in section 948a(1)(A)(i).[8]

Second, given that the MCA requires a CSRT determination of unlawfulness *organization by organization*, rather than *individual by individual*, the accused's CSRT clearly suffices to establish jurisdiction here. As the CSRT recognized, the Government possesses evidence that Khadr "is a member of al Qaida," that he "is an al Qaida fighter," that he "attended an al Qaida training camp," that he "admitted to working as a translator for al Qaida to coordinate land mine missions," that he admitted performing "acts of terrorism," and that he admitted being a "terrorist." Unclassified Summary of Evidence for Combatant Status Review Tribunal, ¶ 3 (Aug. 31, 2004) (attached as Exhibit R-1 to CSRT record). The CSRT then concluded that the Government's classified evidence amply supported its unclassified allegations regarding Khadr's membership in and participation with al Qaeda, and the Tribunal therefore held that the accused was properly detained. That determination places Khadr squarely within the bounds of the statutory parenthetical and thus establishes jurisdiction over the accused.[9]

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[8] And lest there be any doubt that the President's 2002 order adjudged members of al Qaeda to be an "unlawful enemy combatants," the President unambiguously declared again on July 20, 2007, that "members of al Qaeda . . . are unlawful enemy combatants." *See* Executive Order (July 20, 2007), § 1(a) ("On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination.").

[9] The court below suggested that the MCA and "certain requirements of international law" render Khadr's CSRT insufficient to support the accused's unlawful enemy combatant status—that "[t]he term 'unlawful' is not excess baggage," and a finding that Khadr himself is "unlawful" "is a critical predicate to jurisdiction." June 29 Op. at 3-4. Both Article 4 of the Geneva Convention and the definition of lawful combatant in the MCA, however, make clear that the question of lawful versus unlawful combatancy is a question about the characteristics of the organization of which the Defendant is a "member," not the Defendant himself. *See* 10 U.S.C. § 948a(2) (in defining "lawful enemy combatant," asking exclusively whether the person "*is a member*" of certain types of "regular forces" or of a "militia, volunteer corps, or organized resistance movement" that bears certain characteristics) (emphasis added); Third Geneva Convention Art. 4(A)(2) (once determining that a person is a member of an organization, lawful combatancy, and prisoner of war protection, depend on whether "such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions—" including responsible command,

2. Congress Was Aware of the Determination Made Under CSRT Rules at the Time of the MCA's Enactment and Ratified It as Adequate to Establish Military Commission Jurisdiction

As explained above, the statutory parenthetical directly resolves questions of unlawfulness in Khadr's case and in the Nation's conflict with al Qaeda more broadly. Contrary to the trial court's ruling, therefore, the CSRT's determination that Khadr was an "enemy combatant"—specifying his connection with al Qaeda—clearly suffices to establish jurisdiction. Another reality makes the trial court's mistake even starker: Congress had an in depth awareness of the CSRT rules. That knowledge highlights the error of the trial court's superficial focus on the formal difference in title between the CSRT's ultimate finding—under rules in place at the time of the MCA's enactment—and the "unlawful enemy combatant" determination referenced in the MCA.

With the CSRT rules before them, Congress provided that final CSRT determinations, reached "before" the date of the MCA's enactment, would be dispositive of military commission jurisdiction. 10 U.S.C. §§ 948a(1)(A)(ii), 948d(c). The Supreme Court has emphasized that it is "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). At the time of the MCA's enactment, all but 14 detainees held at Guantanamo had received a CSRT; therefore, the inclusion of the word "before" in both sections 948a and 948d must be read to manifest Congress's understanding that potentially hundreds of administrative proceedings that already had been completed need not start afresh under new rules to establish jurisdiction. The trial court's conclusion to

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wearing uniforms and conducting their operations in accordance with the laws of war). The accused's CSRT made the membership determination; it makes no sense for the characterization of the organization of which he is member to be assessed individually, as opposed to organization by organization.

the contrary turns the MCA's text and structure on its head: It transforms what Congress intended to be an efficiency-promoting provision into a meaningless one, given that *no* CSRT ever had rendered a determination with the formal title "unlawful enemy combatant," and for good reason in the current conflict (*see* Part II.B.1, *supra*).[10] And it leads to the aberrant result that Congress referred to a null set of CSRT determinations—those made "before" the MCA's enactment that would establish military commission jurisdiction—given the CSRT rules in place at the time. Permitting CSRTs conducted under rules in place at the time of the MCA's enactment to establish military commission jurisdiction is the only reading that gives effect to all terms of the statute—"unlawful," the statutory parenthetical, and "before . . . the date of" the MCA's enactment.

The trial court, to be sure, recognized Congress's thorough awareness of the CSRT rules. *See* June 29 Op. at 6-7. According to the trial court, however, Congress "expected that the CSRT would have its standards *modified* to meet the requirements of the M.C.A." June 29 Op. at 7 (emphasis added). This cannot be.

First, Congress could not have expected that the Department of Defense would have modified CSRT standards, held new tribunals, and reached final determinations *before* the date of enactment of the statute. Indeed, the debate over the MCA from drafting to passage was accomplished in a matter of months. Accordingly, Congress would not have deemed CSRT determinations of unlawful combatancy "before" the date of enactment of the statute to be dispositive, had it harbored a global intention, as a consequence of passing the MCA, to require new CSRTs under new rules for every

[10] Indeed, in combination with the trial court's ruling that the military commission cannot directly determine "unlawful enemy combatant" status and therefore its jurisdiction, the trial court's order turns this congressional effort to avoid duplicative proceedings and to streamline military commission prosecutions into a *de facto* suspension of military commissions.

individual in United States custody who would be charged with a war crime. The military judge's contrary ruling would have the cause in this instance follow the effect.

Second, we need not speculate regarding whether Congress desired a fundamental overhauling of the CSRT rules. Congress has required changes in the past; it has recognized the significance of requiring such changes; and it has spoken clearly when requiring them. In the Detainee Treatment Act of 2005, Congress required the Secretary of Defense to supplement the then-effective CSRT rules with a "new evidence" rule. *See* DTA § 1005(a)(3). Signaling the significance of requiring such a change, the DTA required the Department of Defense to submit its revised CSRT regulations to Congress within 180 days. *Id.* § 1005(a)(1). The Department of Defense amended its CSRT regulations and submitted those new rules to Congress in the Summer of 2006. *See* Deputy Secretary of Defense Order of July 14, 2006, enclosure 10 ("Implementation of the Detainee Treatment Act of 2005"). When the President proposed the MCA on September 6, 2006, and during the ensuing months of congressional debate, Congress had the current CSRT rules before it.

In the MCA, however, Congress legislated all around the CSRT rules and expressly referred to the legal effect of prior CSRT proceedings under those rules, never once suggesting that a change in the governing rules for CSRTs was required, and never once hinting that additional rules for CSRTs must be submitted to Congress before military commissions could proceed. *Compare* 10 U.S.C. § 949a(d) (requiring new rules for military commissions to be submitted to Congress). It is a well-established rule that "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *See Young v. Cmty.*

Nutrition Inst., 476 U.S. 974, 983 (1986). "This rule is based upon the theory that the legislature is familiar with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing that statute. Therefore it impliedly adopts the interpretation upon" careful detailed legislative action in the field of the interpretation. 2B Norman J. Singer, *Sutherland Statutory Construction* 108 (2000) (citing *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 492 (1943); *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954)). Thus, far from expressing its "expect[ation] that the CSRT would have its standards modified," June 29 Op. at 7, Congress—through the MCA's silence—effectively *ratified* the CSRT rules in place at the time and confirmed that the determination rendered under these rules is sufficient to establish military commission jurisdiction.

Third, under the trial court's reading of the MCA, Congress intended the inclusion of the lone word "unlawful" in the MCA's jurisdictional provision to indicate fundamental disapproval of the settled CSRT structure that it had recently and explicitly approved. This would not be merely a tweak in procedures for future CSRT proceedings; it would render all prior CSRTs inadequate to the task of settling military commission jurisdiction and require a shift in the conclusions made by CSRTs. But in addition to the fact that *Congress itself* determined (via the statutory parenthetical) that members of al Qaeda are "unlawful" enemy combatants, it also bears emphasizing that Congress rarely topples an entire administrative regime so subtly. As the Supreme Court has held, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague

terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Congress properly understood existing CSRT rules to provide a sufficient determination of an individual's association with al Qaeda or the Taliban. As explained above, Congress included a statutory determination in the MCA that al Qaeda and the Taliban were unlawful, echoing the President's. Honoring Congress's judgment that these determinations together were sufficient to provide military commission jurisdiction is the only interpretation that gives effect to all terms of the statute.

3. The Court Did Not Properly Address the Secretary of Defense's Interpretation of the MCA

To the extent that the MCA is ambiguous on the sufficiency of CSRTs, conducted under the rules in force at the time of the MCA's enactment, to establish military commission jurisdiction, the Secretary of Defense's interpretation of the MCA in the Manual for Military Commissions tips the balance. The interpretation—issued pursuant to an affirmative delegation of rulemaking power from Congress—is entitled to deference under governing law. The lower court's ruling to the contrary was erroneous.

In the discussion note following RMC 202(b), the Secretary concluded that CSRT decisions before the MCA's enactment sufficed to establish jurisdiction. Specifically, the Secretary recognized that:

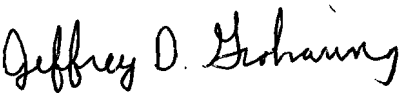
> At the time of the enactment of the M.C.A., C.S.R.T. regulations provided that an individual should be deemed to be an "enemy combatant" if he "was part of or supporting al Qaeda or the Taliban, or associated forces engaged in armed conflict against the United States or its coalition partners." The United States previously determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.

RMC 202(b), *discussion note* ¶ 2. While CSRTs are sufficient to establish jurisdiction, however, the Secretary also recognized that they are not necessary: "The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding." *Id.* ¶ 4. Thus, the Secretary concluded, CSRTs constitute a safe harbor to establish military commission jurisdiction. The Secretary's interpretation of the Act in the Manual is an interpretation of a statute, by the agency charged by Congress to implement it, in the form that Congress specified. Thus, it may be overturned only if plainly contrary to the statute or unreasonable. *See Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

The court below completely failed to recognize—much less refute—the Government's arguments on this point. In light of the fact that *Chevron* applies to an agency head's promulgation of procedures for intra-agency adjudications, *see, e.g.*, *De Sandoval v. U.S. Att'y Gen.*, 440 F.3d 1276, 1281 (11th Cir. 2006), it clearly applies to the Secretary's promulgation of procedural rules to govern military commission trials inside the Department of Defense. Because the court below did not (and could not) show that the Secretary's interpretation of the MCA is manifestly unreasonable, the decision below must be reversed.

Prayer for Relief

As explained in its initial brief, the Government respectfully requests this Honorable Court grant this appeal and remand the case to the trial court for hearings consistent with this Court's opinion.



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Dated: 23 July 2007

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to Lieutenant Commander William Kuebler on the 23rd day of July 2007.

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